STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2008
v	No. 272103 Crawford Circuit Court
JOSEPH MARRHEW HASKIN, Defendant-Appellant.	LC No. 05-002380-FH; 05-002352-FH

Before: Kelly, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of one count of delivering a mixture containing less than 50 grams of fentanyl, MCL 333.7401(2)(a)(*iv*), and two counts of delivering a mixture containing less than 50 grams of morphine, MCL 333.7401(2)(a)(*iv*). We affirm in part, reverse in part, and remand for a new trial on the fentanyl delivery charge.

On appeal defendant first claims that the trial court improperly admitted evidence "about the alleged testing of the pills and patches allegedly sold to the undercover deputy and the forensic scientist's opinions about it." To the extent that defendant premises his claim on the inadmissibility of a forensic laboratory report that was admitted into evidence, our review is for plain error affecting his substantial rights because no such objection was raised below. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). With regard to defendant's claim that the expert witness testimony identifying "the pills and patches" was improperly admitted, our review of this preserved claim is for an abuse of discretion. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant's convictions arise from his one-time sale of fentanyl patches and two sales of morphine pills to an undercover police officer. First we consider the fentanyl conviction. To sustain a conviction of delivery of less than 50 grams of fentanyl, there must be proof beyond a reasonable doubt that defendant knowingly delivered fentanyl and that the fentanyl was in a mixture that weighed less than 50 grams. See MCL 333.7401; *People v Mass*, 464 Mich 615, 638; 628 NW2d 540 (2001). Here, to establish that the illegal substance was fentanyl, the prosecution admitted into evidence a forensic laboratory report. But the forensic scientist who compiled the report, Karen Brooks, did not testify at trial; rather, the report was admitted into evidence, under MRE 803(6), during the testimony of another forensic scientist, John Lucey. Lucey testified from the report as to the methodology Brooks used to determine and conclude that fentanyl was present in the patch.

The prosecution concedes that, pursuant to *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003), the admission of the forensic laboratory report was erroneous. Lucey's testimony regarding the report—including Brooks' testing of the fentanyl patches and her conclusions—was also inadmissible. But, the prosecution claims that defendant cannot establish plain error warranting relief because Lucey also testified that he "performed an independent identification of the drugs" and determined that they were fentanyl patches. This "independent identification" consisted of Lucey comparing the labels of the packets containing the patches to photographs in a reference book.

At trial, defendant objected to the admission of Lucey's testimony that the packets contained fentanyl patches because the testimony was based solely on a comparison of pictures, not a chemical analysis. Defendant claimed that the expert's opinion was not supported by a sufficient foundation. Albeit somewhat inarticulate, and contrary to the prosecution's argument on appeal, it is clear that defendant objected to this testimony on the ground that it violated MRE 702. The trial court overruled the objection, permitting the testimony. We disagree with the trial court's decision.

Under MRE 702, expert opinion testimony must be based on sufficient facts or data and be the product of reliable principles and methods. Here, Lucey's expert testimony was that the packaging of the substance alone led to his affirmative conclusion that the packets contained an illegal substance. This testimony was neither based on sufficient facts nor was it the product of reliable methods. Moreover, contrary to the prosecution's claim on appeal, Lucey testified that "the packages may contain the drug fentanyl." This was the only evidence—other than the inadmissible forensic laboratory report—that established the identity of the substance. This evidence is certainly not proof beyond a reasonable doubt that the substance was fentanyl. Thus, the admission of the forensic laboratory report constituted plain error affecting defendant's substantial rights. See *Carines*, *supra*. We reverse defendant's conviction and sentence for delivering fentanyl and remand for a new trial on that charge.

Next, we consider defendant's convictions on two counts of delivering a mixture containing less than 50 grams of morphine, MCL 333.7401(2)(a)(*iv*). Defendant appears to challenge these convictions in his statement of questions presented, however he failed to appropriately argue the merits of this issue. See MCR 7.212(C); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). But to the extent that defendant is arguing that Lucey's testimony regarding the morphine pills should not have been admitted, we reject such argument. Contrary to defendant's claim on appeal, Lucey testified that he personally performed a chemical analysis on one of the several tablets in evidence and the testing revealed that morphine was contained within the tablet. The other tablets were the same in appearance and had the same markings. Therefore, Lucey's testimony with regard to this evidence was properly admitted.

Defendant next claims that he was denied the effective assistance of counsel by his trial counsel's failure to raise an insanity or temporary insanity defense. Because a *Ginther*[1] hearing

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

was not conducted, our review is for mistakes apparent on the existing record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 659. In showing that counsel's representation was deficient, a defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

A defendant is entitled to have his attorney investigate and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Under MCL 768.21a(1), a person "is legally insane if, as a result of mental illness . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." Pursuant to MCL 768.21a(3), this affirmative defense must be proved by defendant by a preponderance of the evidence.

Here, defendant has failed to provide any evidence that such a condition existed at the time of the offense to support the reasonable consideration or investigation of an insanity defense. Defendant also claims that he may have had a viable temporary insanity defense based on involuntary intoxication because of his chronic, long-term drug use. See *People v Caulley*, 197 Mich App 177, 187-188; 494 NW2d 853 (1992). But there is no evidence that defendant's intoxication was involuntary or that he did not appreciate the wrongfulness of his conduct or that he was unable to conform his conduct to the requirements of the law. See *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001). Accordingly, defendant's trial counsel was not ineffective for failing to raise either defense.

Finally, defendant claims that the trial court scored and sentenced defendant based on inaccurate information and inadequate investigation. But these claims were not preserved, and so they are precluded from appellate review because defendant was sentenced within the guidelines range. MCL 769.34(10); MCR 6.429(C); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). However, defendant did preserve the constitutional claim of error that his sentences violate the state and federal constitutional guarantees against cruel and unusual punishment under US Const, Am VIII and Const 1963, art 1 § 16. See *Carines*, *supra* at 774.

In considering whether a sentence is "cruel and unusual," we look at whether the harshness of the penalty is proportionate to the gravity of the offense, given the goal of rehabilitation. See *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996). Defendant was convicted of three very serious felonies. The guidelines range for his minimum sentence was 0 to 21 months. Despite this, and despite a recommendation by the Department of Corrections that defendant be sentenced to at least 18 months for each count, with the fentanyl sentence running consecutive to concurrent terms for the morphine convictions (for a total minimum of 36 months), the trial court only sentenced defendant to 13 months on each, with the fentanyl conviction running consecutive to concurrent terms for the morphine convictions (for a total of 26 months). There is nothing to indicate the trial court erred by not giving an even more lenient minimum sentence than suggested by the Department of Corrections. And, while the

maximum sentences are long, they are appropriate for the seriousness of the offenses as well as defendant's habitual offender status. See MCL 333.7401(2)(a)(iv); MCL 769.10.

Further, in sentencing defendant, the court referenced letters sent to it on his behalf and stated that it had "no doubt" that defendant "was basically, at heart, not a bad person." This suggests an understanding on the trial court's part of defendant's rehabilitative potential, which could be considered implicit in the sentence imposed. Further, when defendant asked whether the court believed that a "prison sentence is going to do me any good, . . . making life any better for the future," the court responded, "I think it will, because they have a hospital facility that's State-of-the-art, provide you the best possible care, much better than you'd get in the County Jail." In sum, under the circumstances, defendant's challenge to the sentences imposed is without merit.

In his Standard 4 brief on appeal, defendant argues that he was denied due process of law when the trial court stated at the beginning of the trial that he had pleaded guilty to all of the charges. This unpreserved claim does not warrant relief. See *Carines*, *supra*. Looking at the transcript in its entirety, it is likely that the cited error was a transcription error. Assuming that the court did misspeak, the obviousness of the error and the totality of the instructions provided render this error harmless.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell